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October 24, 2018

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Seattle, WA 98109

Amazon.com Services, Inc.
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2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833

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Human Resources
Amazon Marketplace Inc.
268 Bush Street
San Francisco, CA 94104

Amazon Marketplace Inc.
c/o URS Agents Inc.
7801 Folsom Blvd., #202
Sacramento, CA 95826

Re: Michael Chavez v. Amazon.com Services, Inc., et al.;
California Labor Code § 2699 Penalties; Notice of Intent for File Suit

General Counsel:

This office, represents Plaintiff Michael Chavez ("Plaintiff") and a proposed group of current and former delivery drivers who are or were classified as independent contractors by Amazon.com Services, Inc., Amazon Logistics, Inc., and Amazon Marketplace Inc., (collectively "Amazon" or "Defendants") in the State of California for violations of California Labor Code §§ 201, 202, 203, 204, 210, 226(a) and (e), 226.2, 226.3, 226.7, 226.8, 512, 1182.11, 1194, 1197, 1197.1, 1198,¹ 1199, 2802 as well as IWC Wage Order 9-2001. Plaintiff wishes to bring a representative action on behalf of himself and the State of California as well as on behalf of the following group of aggrieved employees:

all individuals who are or were classified as independent contractors by Amazon and/or its predecessor or merged entities in California and who perform or performed work as delivery

¹ All alleged violations of IWC Wage Order 9-2001 are also deemed to be alleged violations of Labor Code § 1198.

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drivers or in any similar capacity from one year prior to the date of this letter and continuing into the present (“Aggrieved Employees”);

The purpose of this letter is to comply with the Private Attorneys General Act of 2004 (“PAGA”), pursuant to California Labor Code § 2698 *et seq.* We herein set forth some of the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to our client and all aggrieved employees.²

a. Factual Background

As an online retailer, Amazon allows consumers to purchase retail items through various online portals, which are then delivered to customers by individuals such as Plaintiff and the Aggrieved Employees. Plaintiff and the Aggrieved Employees, termed “delivery drivers” by Amazon, are classified as independent contractors and are *not* classified as employees.

To become a delivery driver for Amazon, Plaintiff and the Aggrieved Employees must upload a robust application, and agree to the terms and conditions of Amazon’s Independent Contractor Agreement. Once the application is completed, Plaintiff and the Aggrieved Employees are required to submit to a background check, and then participate in training courses via online tutorials. This training, which covers Amazon’s policies, practices, and procedures, can take upwards of six hours to view and sometimes longer.

Once Plaintiff and the Aggrieved Employees have completed all the necessary training, Amazon assigns an area to Plaintiff and the Aggrieved Employees for which they are to provide delivery services. Plaintiff and the Aggrieved Employees are also provided with daily delivery schedules by Amazon.

Plaintiff and the Aggrieved Employees are required to follow Amazon’s directions and drive to various locations to either pick up packages or deliver packages to customers. If alcohol is purchased, Plaintiff and the Aggrieved Employees must get the customer to sign for the items, and show their identification to demonstrate that the customer is over 21 years of age. Amazon tracks the movements of Plaintiff and the Aggrieved Employees through the use of a GPS function on Plaintiff’s and the Aggrieved Employee’s cellular phones.

Once a delivery is completed, Plaintiff and the Aggrieved Employees submit a notification to Amazon that the delivery is completed and are then required to drive to the next delivery, per Amazon’s direction and control. If Plaintiff and/or the Aggrieved Employees reject an assigned order, they are subject to discipline in the form of an incident and/or reliability report by Amazon. Too many incident and/or reliability reports can result in deactivation of their account with Amazon and

² See *Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. Jul. 8, 2011) 796 F. Supp. 2d 1246, 1261; *Moua v. Int’l Bus. Machines Corp.* (N.D. Cal. Jan. 31, 2012) No. 5:10-CV-01070 EJD, 2012 WL 370570, at *5; *York v. Starbucks Corp.*, (C.D. Cal. Nov. 1, 2012) No. CV 08-07919 GAF PJWX, 2012 WL 10890355, at *4.

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termination of employment with Amazon.

When Plaintiff and the Aggrieved Employees are not participating in active deliveries, they are effectively on-call as they must be ready for Amazon to inform them of the next delivery. Failure to comply with Amazon's policies, practices, and procedures will result in termination.

b. Claims Asserted by Plaintiff

i. *Plaintiff and the Aggrieved Employees were Misclassified as Independent Contractors*

Recently, the California Supreme Court in *Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal. 5th 903, 956-958, a case involving delivery drivers, set forth the standard for determining whether an individual performing work is an independent contractor or an employee, as follows:

We find merit in the concerns noted above regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors. As a consequence, we conclude it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test — namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. [Citations].

The standard is commonly referred to as the “ABC test.” Under the ABC Test, Defendants have the burden of establishing that Plaintiff and the Aggrieved Employees are independent contractors and not intended to be included within the wage order's coverage. Further, Defendants must establish that Plaintiff and the Aggrieved Employees meet all three factors of the ABC Test, which as discussed below, it cannot meet.

A. Plaintiff and the Aggrieved Employees Were Subject to Defendants' Direction and Control: Defendants cannot demonstrate that Plaintiff and the Aggrieved Employees are or were free from the direction and control of the Defendants. At all times, Defendants retained and retains the right to control the method and manner of how Plaintiff and Aggrieved Employees perform their job duties and retained and retains all necessary control over Plaintiff and the Aggrieved Employees during their employment. Among other things, Plaintiff and Aggrieved Employees are required to

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follow detailed requirements imposed on them by Defendants governing their interaction with customers.

As noted above, Plaintiff and the Aggrieved Employees all signed contracts with Amazon where they had to agree to undergo a background check, and then be subject to Defendant's policies, practices, and procedures. To become a delivery driver, for Amazon, Plaintiff and the Aggrieved Employees must upload the application, and agree to the terms and conditions of Amazon's Independent Contractor Agreement. Once the application is completed, Plaintiff and the Aggrieved Employees are required to submit to a background check, and then participate in training courses via tutorials through the application. This training, which covers Amazon's policies, practices, and procedures, can take upwards of six hours to view.

Pursuant to Amazon's direction, once Plaintiff and the Aggrieved Employees have completed all the necessary training, Amazon assigns an area to Plaintiff and the Aggrieved Employees for which they are to provide delivery services. Plaintiff and the Aggrieved Employees are also provided with daily delivery schedules by Amazon.

Pursuant to Amazon's direction, Plaintiff and the Aggrieved Employees are required to drive to various locations to either pick up packages or deliver packages to customers. If alcohol is purchased, Plaintiff and Aggrieved Employees must get the customer to sign for the items, and show their identification to demonstrate that the customer is over 21 years of age. Amazon tracks the movements of Plaintiff and the Aggrieved Employees through the use of a GPS function found within the application.

Pursuant to Amazon's direction, once the delivery is completed, Plaintiff and the Aggrieved Employees submit a notification to Amazon that the delivery is completed and are then required to drive to the next delivery. If the Plaintiff and the Aggrieved Employees reject an assigned order, they are subject to an incident and/or reliability report by Amazon. Too many incident and/or reliability reports can result in termination of their deactivation and termination of employment with Amazon.

Pursuant to Amazon's direction, when Plaintiff and the Aggrieved Employees are not participating in active deliveries, they must remain on-call. Failure to comply with Amazon's policies, practices, and procedures will result in termination.

Thus, Amazon not only tracked where Plaintiff and the Aggrieved Employees were at all times, but also informed them of where they had to drive to, including determining the exact pick up or drop off location at any time. Additionally, Amazon sets the compensation of Plaintiff and the Aggrieved Employees, by paying per "block", which typically results in remuneration of approximately \$18.00 per hour.

Indeed, the California Supreme Court in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522, held that the existence of a contract, and its relevant terms was key to determining control.

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The trial court here afforded only cursory attention to the parties' written contract, instead concentrating on the particulars of the parties' many declarations and detailing a dozen or so ways in which delivery practices, or Antelope Valley's exercise of control over those practices, varied from carrier to carrier—e.g., whether carriers were instructed on how to fold papers, whether they bagged or “rubber banded” papers, and whether they followed the delivery order on their route lists. In so doing, the court focused on the wrong legal question—whether and to what extent Antelope Valley exercised control over delivery. But what matters is whether a hirer has the “*legal right* to control the activities of the alleged agent” (*Malloy v. Fong, supra*, 37 Cal.2d at p. 370, 232 P.2d 241, italics added) and, more specifically, whether the extent of such legal right is commonly provable. In cases where there is a written contract, to answer that question without full examination of the contract will be virtually impossible. (See *Tieberg v. Unemployment Ins.App. Bd., supra*, 2 Cal.3d at p. 952, 88 Cal.Rptr. 175, 471 P.2d 975 [written agreements are a “significant factor” in assessing the right to control]; *Grant v. Woods, supra*, 71 Cal.App.3d at p. 653, 139 Cal.Rptr. 533 [**“Written agreements are of probative significance”** in evaluating the extent of a hirer's right to control].) Evidence of variations in how work is done may indicate a hirer has not exercised control over those aspects of a task, but they cannot alone differentiate between cases where the omission arises because the hirer concludes control is unnecessary and those where the omission is due to the hirer's lack of the retained right. That a hirer chooses not to wield power does not prove it lacks power. (*Malloy*, at p. 370, 232 P.2d 241 [“It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship.”]; *Robinson v. George* (1940) 16 Cal.2d 238, 244, 105 P.2d 914 [absence of evidence a hirer “exercised any particular control over the details” of the work does not show the hirer lacked the right to do so].) One must consider the contract as well.

Id. at 534–35. (Emphasis not added). Here, the independent contractor agreement, and Amazon’s policy and practices, and training each delivery driver for Amazon must complete before driving indicates the level of control Amazon has over Plaintiff and the Aggrieved Employees.

Thus, as clearly stated in the contracts, Defendants retained and retains the right to control the method and manner of how Plaintiff and Aggrieved Employees performed their job duties and retained and retains all necessary control over Plaintiff and the Aggrieved Employees during their employment. As described above, Defendants control and controlled what duties Plaintiff and the Aggrieved Employees would perform, where the duties would be performed, how the duties were performed, and when the duties would be performed. Further, Defendants set their compensation.

As a result, under applicable law, Plaintiff and the Aggrieved Employees were employees of Defendant. See, e.g. *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522; *Ruiz v. Affinity Logistics, Corp.*, 754 F.Supp.3d 1093 (9th Cir. 2014) (employer’s right to control detail of

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drivers' work support finding of employer-employee relationship); *Alexander v. FedExGround Package System, Inc.* 765 F.Supp.3d 381 (9th Cir. 2014) (driver were employees as a matter of law where FedEx controlled times drivers worked and controlled aspects of when packages would be delivered); *See, also, Taylor v. Shippers Transport Express, Inc.*, 2014 W.L. 7499046 (C.D. Cal. 2014) (finding employee status for drivers as a matter of law); and *Villapando v. Excel Direct, Inc.*, 2015 W.L. 15179486 (N.D. Cal. 2015) (granting summary judgment to Plaintiffs on Defendant's defense that the drivers at issue were independent contractors). Under applicable standards of law, Plaintiff and the Aggrieved Employees are, or were during their employment by Defendant, were employees and not independent contractors.

As such, Defendants kept and maintained control over Plaintiff and the Aggrieved Employees throughout their employment, and thus, Defendants cannot meet its burden of proving that Plaintiff and the Aggrieved Employees are properly classified independent contractors for this reason alone. But as seen below, Defendants cannot meet the other two factors either.

B. Plaintiff and the Aggrieved Employees Performed Work Within the Usual Course of the Defendants' Business: As described by the Court in *Dynamex*, the work performed within the course of the defendant's business is described thusly, "Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business." *Dynamex Operations W. v. Superior Court, supra*, 4 Cal. 5th at 959. By way of example, the Supreme Court held that:

Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. [citations] On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company [citations], or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes (*cf.*, *e.g.*, *Dole v. Snell* (10th Cir. 1989) 875 F.2d 802, 811), the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.

Id. at 959-960. Here, Defendants cannot establish that Plaintiff and the Aggrieved Employees perform work outside the Defendants' normal course of business. Amazon's business is the selling of general merchandise and electronics to its customers. Customers submit orders to Amazon, and Amazon sends Plaintiff and the Aggrieved Employees to complete those orders by delivering them

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to Amazon's customers. Thus, Plaintiff and the Aggrieved Employees are the individuals who are performing the work that Amazon is being paid by its customers to perform. At their customer's request, Plaintiff and the Aggrieved Employees, deliver the items to the customer's address.

Thus, the employment of Plaintiff and the Aggrieved Employees as delivery drivers for a company that delivers general merchandise and electronic to its customers is more akin to a bakery hiring a cake decorator than a retailer hiring a plumber. As such, there can be no doubt that Plaintiff and the Aggrieved Employees are performing work in the usual course of Amazon's business.

C. The Plaintiff and the Aggrieved Employees Were Not Customarily Engaged in an Independently Established Trade, Occupation, Or Business of the Same Nature as the Work Performed: As with the A and B of the ABC Test, Defendants cannot establish that Plaintiff and the Aggrieved Employees are employees customarily engaged in an independent occupation, or business. As the Supreme Court in *Dynamex* held:

As a matter of common usage, the term “independent contractor,” when applied to an individual worker, ordinarily has been understood to refer to an individual who *independently* has made the decision to go into business for himself or herself. [citations] Such an individual generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like. When a worker has not independently decided to engage in an independently established business but instead is simply designated an independent contractor by the unilateral action of a hiring entity, there is a substantial risk that the hiring business is attempting to evade the demands of an applicable wage order through misclassification. A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.

Dynamex Operations W. v. Superior Court, supra, 4 Cal. 5th at 962.

Here, Plaintiff and the Aggrieved Employees are not operating as independent businesses. They are providing delivery services to Amazon's customers, using Amazon's cell phone app (or other online portal) in compliance with Amazon's policies, practices, and procedures, and are delivering packages to customers with Amazon's logo on them. In short, they are holding themselves out to the public as employees of Amazon, not as independent businesses.

Thus, under the standards of the ABC test, Plaintiff and the Aggrieved Employees are clearly

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“employees” and not “independent contractors.” *Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal. 5th 903, 956-958; *See, e.g. Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. App. 4th 522; *Ruiz v. Affinity Logistics, Corp.*, 754 F.Supp.3d 1093 (9th Cir. 2014) (employer’s right to control detail of drivers’ work support finding of employer-employee relationship); *Alexander v. FedExGround Package System, Inc.* 765 F.Supp.3d 381 (9th Cir. 2014) (driver were employees as a matter of law where FedEx controlled times drivers worked and controlled aspects of when packages would be delivered); *See, also, Taylor v. Shippers Transport Express, Inc.*, 2014 W.L. 7499046 (C.D. Cal. 2014) (finding employee status for drivers as a matter of law); and *Villapando v. Excel Direct, Inc.*, 2015 W.L. 15179486 (N.D. Cal. 2015) (granting summary judgment to Plaintiffs on Defendant’s defense that the drivers at issue were independent contractors).

And because Defendants cannot meet any part of the ABC test, it is clear that Defendants intentionally and willfully misclassified Plaintiff and Aggrieved Employees as independent contractors in violation of Labor Code § 226.8(a).

ii. *Plaintiff and the Aggrieved Employees Were Not Compensated for All Hours worked*

California Labor Code § 226.2 governs compensation paid to piece-rate employees, like Plaintiff and the Aggrieved Employees. It states, in the relevant part:

This section shall apply for employees who are compensated on a piece-rate basis for any work performed during a pay period. This section shall not be construed to limit or alter minimum wage or overtime compensation requirements, or the obligation to compensate employees for all hours worked under any other statute or local ordinance. For the purposes of this section, “applicable minimum wage” means the highest of the federal, state, or local minimum wage that is applicable to the employment, and “other nonproductive time” means time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period:

(1) Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.

(2) The itemized statement required by subdivision (a) of Section 226 shall, in addition to the other items specified in that subdivision, separately state the following, to which the provisions of Section 226 shall also be applicable:

(A) The total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period.

(B) Except for employers paying compensation for other nonproductive time in accordance with paragraph (7), the total hours of other nonproductive time, as

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determined under paragraph (5), the rate of compensation, and the gross wages paid for that time during the pay period.

Thus, according to Cal. Labor Code §226.2, which codifies the decision in *Armenta v. Osmose, Inc.* (Cal. App. 2d Dist. 2005) 135 Cal. App. 4th 314, employees who are paid on a piece-rate basis, such as Plaintiff and the Aggrieved Employees, must be compensated for all the hours that they work, including non-productive time.

However, and due to Defendants' misclassification of Plaintiff and the Aggrieved employees as independent contractors, Plaintiff and the Aggrieved Employees were not paid for non-productive time while employed by the Defendants. Instead, Plaintiff and the Aggrieved Employees only received compensation based on the deliveries made. Thus, time spent waiting for an order, or planning their routes, and all other nonproductive tasks typically taking up to an hour or more, was not compensated. As a result, Plaintiff and the Aggrieved Employees were denied compensation for all hours worked, in violation of Cal. Labor Code §1194, and were denied compensation at the minimum wage in violation of Cal. Labor Code §§1197 and 1199.

iii. Plaintiff and the Aggrieved Employees Were Not Paid for Their Overtime Hours Worked

Labor Code § 510 requires an employer to compensate an employee who works more than eight (8) hours in one workday, forty (40) hours in a workweek, and for the first eight (8) hours worked on the seventh consecutive day no less than one and one-half times the regular rate of pay for an employee. Further, Labor Code § 510 obligates employers to compensate employees at no less than twice the regular rate of pay when an employee works more than twelve (12) hours in a day or more than eight (8) hours on the seventh consecutive day of work. In accordance with Labor Code §§ 1194, Plaintiff and the other aggrieved employees could not agree to work for a lesser wage than the amount proscribed by Labor Code §1194.

Defendants pays and paid Plaintiff and the Aggrieved Employees on a piece rate basis. But because Plaintiff and the Aggrieved Employees were classified as independent contractors, they do and did not receive the overtime premium for working in excess of eight hours in a day, or more that forty hours in a workweek, in violation of IWC Wage Order 9-2001, and Labor Code §1194. At all times throughout their employment, Plaintiff and the other Overtime Aggrieved employees do not meet the requirements of any exemption delineated in Section 3 or 4 of Wage Order 9-2001.

As a result of Defendants' misclassification of Plaintiff and the Overtime Aggrieved Employees as independent contractors, Defendants do not compensate employees for all hours worked, or pay overtime compensation. Thus, Plaintiff is an Aggrieved Employee, and may seek penalties pursuant to PAGA.

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iv. Plaintiff and the Aggrieved Class Members Are and Were Not Provided Paid Rest Periods and Were Not Paid Missed Rest Period Premiums

As a result of their misclassification of Plaintiff and the Aggrieved Employees as independent contractors, Defendants failed to provide Plaintiff and the other Aggrieved Employees with compensated, duty-free rest periods of not less than ten (10) minutes for every major fraction of four hours worked pursuant to Labor Code § 226.7, and Wage Order 9-2001.

Under IWC Wage Order 9-2001, an employer must authorize and permit all employees to take ten (10) minute duty free rest periods for every major fraction of four hours worked. Labor Code § 226.7 provides “an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission (“IWC”).” Thus, the Wage Orders set when and for how long the rest period must take place, and the Labor Code establishes that violations of the Wage Order violate California law, and sets forth the premium pay employers must pay their employees when employers fail to provide rest periods.

Because Defendants misclassified Plaintiff and the Aggrieved Employees as independent contractors, Defendants failed to implement a lawful rest period policy that informed Plaintiff and the other Aggrieved Employees of their right to receive lawful rest periods for shifts that were more than at least a major fraction of four hours worked.

Pursuant to Labor Code § 226.7 and Wage Order 9-2001, Defendants failed to provide Plaintiff and the all Aggrieved Employees with duty-free rest periods of not less than ten (10) minutes for every major fraction of four (4) hours worked. Specifically, as a result of their misclassification of Plaintiff and the Aggrieved Employees as independent contractors, Defendants failed to have a lawful rest period policy in place that informed Plaintiff and the other Aggrieved Employees of their right to take rest periods for shifts that were a major fraction of a four (4) hour work period and to make rest breaks available to these employees.

The California Supreme Court in *Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, explained in the context of rest breaks that employer liability attaches from adopting an unlawful policy:

An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not-if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required-it has violated the wage order and is liable.

Id. at 1033. Since Defendants did not offer employees the opportunity to receive a compliant and appropriately separately compensated rest periods, “the court may not conclude employees voluntarily chose to skip ... breaks.” *Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 410 (2015) (“[i]f an employer fails to provide legally compliant meal or rest breaks, the court

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may not conclude employees voluntarily chose to skip those breaks."); accord *Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal. 4th 1004, 1033 (2012) ("No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it.").

Even an employer who maintains an otherwise compliant rest period policy, "reminded their employees of their availability-and the importance-of taking breaks on a daily basis, and even went so far as to conduct regular audits to ensure that employees were being offered rest breaks" will still be liable for rest period violations if the employees were not separately or properly compensated for the non-productive time associated with rest periods under a piece-rate compensation system. *Amaro v. Gerawan Farming, Inc.*, 2016 U.S. Dist. LEXIS 66842 * (E.D. Cal. May 19, 2016) *aff'd* *Amaro v. Gerawan*, 2016 U.S. Dist. LEXIS 112540, 2016 WL 4440966, at * 11 (E.D. Cal. Aug. 22, 2016).

Here, not only did Defendants not have a rest period policy and did not compensate Plaintiff and the Aggrieved Employees for their rest periods, but in fact, had a policy that effectively fined Plaintiff and the Aggrieved Employees for taking breaks by insuring that those rest periods were unpaid. Further, because Plaintiff and the Aggrieved Employees were effectively on-call during their shifts, Plaintiff and the Aggrieved Employees were never relieved of all duties while working. In addition to not being provided rest periods, and being actively discouraged from taking them, Plaintiff and all Aggrieved Employees were not compensated with one (1) hours' worth of pay at their regular rate of compensation when they were not provided with a compliant rest period.

iv. *Plaintiff and the Aggrieved Employees Are and Were Not Provided with Meal Periods*

Labor Code § 512 requires employers to provide employees with thirty (30) minute uninterrupted and duty-free meal period within the first five hours of work. "An on-duty meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty and the parties agree in writing to an on-duty paid meal break." *Lubin v. The Wackenhut Corp.* (2016) 5 Cal. App. 5th 926, 932. The written agreement must include a provision allowing the employee to revoke it at any time. *Id.*

As with rest periods, under Labor Code § 512, if an employer maintains a uniform policy that does not authorize and permit the amount of meal time called for under the law (as specified in the applicable Wage Order), "it has violated the wage order and is liable." The *Brinker* Court explained in the context of rest breaks that employer liability attaches from adopting an unlawful policy:

An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—***it has violated the wage order and is liable.***

Brinker Rest. Corp. v. Sup. Ct., *supra*, 53 Cal.4th at 1033. (Emphasis added.)

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As a result of Defendants misclassifying Plaintiff and the Aggrieved Employees as independent contractors, Defendant violated Labor Code § 512 by failing to advise Plaintiff and all Aggrieved Employees of their right to receive thirty (30) minute uninterrupted meal periods within the first five hours of the employee's shift. In fact, because Defendants misclassified Plaintiff and the Aggrieved Employees as independent contractors, it did not set any policies providing meal periods to Plaintiff and the Aggrieved Employees. To the contrary, Plaintiff and the Aggrieved Employees were placed on-call at all times during their working hours.

As a result of Defendants' failure to authorize or permit lawful meal periods because Defendants misclassified Plaintiff and the Aggrieved Employees as independent contractors, Plaintiff and the other Aggrieved Employees frequently did not receive duty-free meal periods within the first five (5) hours of their work. Defendants also failed to pay Plaintiff and the other Aggrieved Employees meal period premiums for each workday that the employees did not receive a compliant duty-free meal period.

Similarly, IWC Wage Order 9-2001, prohibits an employer from "employ[ing] any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. IWC Wage Order 9-2001 further obligates employers to provide an employee to "pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided. Labor Code § 226.7 provides "an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission ("IWC"). Accordingly, for each day that Plaintiff and the other Aggrieved Employees did not receive compliant meal periods, they are entitled to receive meal period premiums pursuant to Labor Code § 226.7 and Wage Order 9-2001.

vi. Defendants Violate and Violated Labor Code § 204

Labor Code § 204 expressly requires that "[a]ll wages...earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." Pursuant to Labor Code § 204(d), these requirements are "deemed satisfied by the payment of wages for weekly, biweekly or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

As discussed in detail above, and as a result of Defendants classifying Plaintiff and the Aggrieved Employees as independent contractors, failing to pay for non-productive time, including rest periods, and failing to pay meal period premiums and rest period premiums, Defendant failed to pay Plaintiff and the other aggrieved employees at least twice per month in violation of Labor Code § 204. Defendants regularly and consistently failed to pay Plaintiff and the Aggrieved Employees for all of their hours worked, for rest periods and/or rest period premiums, and meal period premiums. Thus, even if Amazon paid Plaintiff and the Aggrieved Employees properly, Defendant would still violate the law.

Labor Code § 210 provides that “in addition to, an entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) for each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25% of the amount unlawfully withheld.” As a result of the faulty compensation policies and practices described in detail above, Plaintiff and the other Aggrieved Employees are entitled to recover penalties under Labor Code § 210 through PAGA.

vii. Defendants Violate and Violated Labor Code §§ 201-203

As a result of Defendants’ misclassification of Plaintiff and the Aggrieved Employees as independent contractors, and as a result of their failure to pay Plaintiff and all Aggrieved Employees for all hours worked, including non-productive time, and meal/rest period premiums, Defendants violated Labor Code § 203. Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

Due to Defendants’ faulty policies described above, Plaintiff and all Aggrieved Employees whose employment with Defendants concluded were not compensated for each and every hour worked. Additionally, Defendants have failed to pay all Aggrieved Employees for all hours worked, rest period premiums, and meal period premiums, whose sums were certain, at the time of termination or within seventy-two (72) hours of their resignation and have failed to pay those sums for thirty (30) days thereafter.

viii. Defendants Violate and Violated Labor Code §§ 226(a) and 226.3

As to Plaintiff and all Aggrieved Employees, Defendants also failed to provide accurate itemized wage statements in accordance with Labor Code § 226(a)(1, 3, 5, 9). Labor Code § 226 obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing:

- (1) gross wages earned;
- (2) total hours worked by the employee;
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;
- (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;
- (5) net wages earned;
- (6) the inclusive dates of the period for which the employee is paid;
- (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number;

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- (8) the name and address of the legal entity that is the employer...;
- (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee...

Similarly, Labor Code § 226(e) provides:

(e) (1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.

(2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

- (i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

- (ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

- (iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.

- (iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

Due to Defendants' failure to issue itemized wage statements as required by California law to Plaintiff and the Aggrieved Employees, Defendants violated Labor Code § 226(a), 226(e), and 226.3.

In addition to violating Labor Code § 226(a), Defendants also knowingly and intentionally failed to provide Plaintiff and the Aggrieved Employees with accurate itemized wage statements in violation of Labor Code § 226(e). Defendants undeniably knew that they were not providing Plaintiff and the other Aggrieved Employees with wage statements required by California law. *See Garnett v. ADT LLC* 139 F. Supp. 3d 1121, 1131 (E.D. Cal. Oct. 6, 2015) (finding that the defendant knowingly and intentionally violated Labor Code § 226 because the "[d]efendant knew that it was not providing total hours worked to plaintiff or other employees paid on commission" even though it believed that employees paid solely on commission or commission and salary "are exempt and therefore we do

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not record hours on a wage statement.”).

Further, even if the earnings statements provided to Plaintiff and the Aggrieved Employees could be considered wage statements under Labor Code section 226, because Defendants misclassified Plaintiff and the Aggrieved Employees as independent contractors, they did not state on the wage statements the proper name and address of the legal entity who is the employer of Plaintiff and the Aggrieved Employees, in violation of Labor Code §226(a)(8). Nor do the earning statements provide the total hours worked, in violation of Labor Code § 226(a)(2), as Amazon simply does not record such time. Thus, even if Amazon’s earning statements could be considered wage statements, such wage statements are inaccurate and incomplete.

Plaintiff and the Aggrieved Employees will prevail on their claim for PAGA penalties under Labor Code § 226(a). *See Lopez v. Friant & Assocs., LLC*, (2017) 15 Cal. Cal. App. 4th 773, 788 (“hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the ‘injury’ and ‘knowing and intentional’ requirements of section 226(e)(1).”); *Willner v. Manpower Inc.* 35 F. Supp. 3d 1116, 1136 (N.D. Cal. 2014) (To obtain judgment on a PAGA claim, “all [plaintiff] needs to establish is a violation of section 226(a), which she has done, as discussed above.”); *McKenzie v. Fed. Exp. Corp.* 765 F.Supp.2d 1222, 1232 (C.D. Cal. 2011) (holding that “for the purposes of recovering PAGA penalties, one need only prove a violation of Section 226(a), and need not establish a Section 226(e) injury.”).³

Following *Friant*, courts have found that employees can recover separate penalties under PAGA for a defendant’s violations of Labor Code § 226(a) and 226(e). *See e.g. Bell v. Home Depot U.S.A.* (E.D. Cal. Dec. 11, 2017) 2017 U.S. Dist. LEXIS 204493, at *5 [finding after *Friant* that “[t]o the extent the Court’s Order [granting summary judgment to Home Depot] was ambiguous, the Court now clarifies that it granted summary judgment on Plaintiffs’ derivative claim for [PAGA] penalties

³ *See also Aguirre v. Genesis Logistics*, 2013 U.S. Dist. LEXIS 189815, at *28 (C.D. Cal. July 3, 2013) (“Plaintiffs do not need to establish a Cal. Lab. Code § 226(e) injury to recover penalties under § 2699(f) of PAGA.”); *York v. Starbucks Corp.*, No. CV 08-07919 GAF PJWX, 2012 WL 10890355, at *2 (C.D. Cal. Nov. 1, 2012) (granting summary adjudication to the plaintiff on his PAGA claim based upon violations of Lab. Code § 226(a) because “the presence or absence of injury is irrelevant to the standing inquiry under PAGA.”) *Pelton v. Panda Restaurant Group, Inc.* (C.D. Cal., May 3, 2011, CV 10-8458 MANx) 2011 WL 1743268 (“[T]he Court rejects defendant’s argument that plaintiff ‘lacks any PAGA injury.’ Pursuant to Cal. Labor Code § 2699, ‘any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ... may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees.’ Sections 2699.5 and 2699.3(a) provide that such a claim may be brought for a violation of § 226(a)”); *accord Lopez v. G.A.T. Airline Ground Support, Inc.* (S.D. Cal., July 19, 2010, 09-CV-2268-IEG) 2010 WL 2839417, *5-6 (“It is undisputed that GAT’s paychecks do not indicate the applicable hourly rate of pay for the employee’s regular rate, overtime rate, or double-time rate of pay... The failure to provide this information violates Section 226(a)... Because Section 226 does not provide a penalty, Section 2699(f) penalties are available.”); *Burnham v. Ruan Transp.*, 2013 U.S. Dist. LEXIS 198505 * (C.D. Cal. Aug. 30, 2013) (holding that to recover damages or penalties under Section 226, plaintiffs must prove they suffered injury. Cal. Lab. Code § 226(e). But to recover penalties under PAGA, even for violations of Section 226, plaintiffs do not need to prove such injury.”).

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under section 226(e)...the Court's Order should not be read to grant summary judgment on Plaintiffs' claim for PAGA penalties based on violation of section 226(a).”)).

Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” Plaintiff and the other Aggrieved Employees may also recover Labor Code § 226.3 penalties for Defendant’s violations of Labor Code § 226(a).

ix. Defendants Violate and Violated Labor Code § 2802

To perform their duties, Plaintiff and the Aggrieved Employees regularly incurred expenses during the course of their employment, such as mileage, cellphone charges for data, and other costs, for which they were not reimbursed. To perform their duties, Plaintiff and the Aggrieved Employees used their own personal vehicles to deliver packages to Defendants’ customers. Further, they were required to utilize their personal cellphones, to use Amazon’s online applications in order to receive delivery instructions, communicate with Amazon’s customers, and to receive driving directions. Plaintiff and the Aggrieved Employees were never reimbursed for the use of their personal vehicles, or cellphone data plans.

Cal. Labor Code §2802 (a) provides that:

An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

Thus, employees such as Plaintiff and the Aggrieved Employees, are entitled to reimbursement for the expenses they incur during the course of their duties. The duty to reimburse even extends to the use of equipment the employee may already own, and would be required to pay for anyway. *Cochran v. Schwan's Home Serv., Inc.* (2014) 228 Cal. App. 4th 1137, 1144 (“The threshold question in this case is this: Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job? The answer is that reimbursement is always required. Otherwise, the employer would receive a windfall because it would be passing its operating expenses on to the employee.”) *Aguilar v. Zep, Inc.*, 2014 WL 4245988 *17 (N.D.Cal. Aug. 27, 2014) (granting partial summary judgment to plaintiffs on liability and concluded that defendant employer was required to reimburse plaintiffs for their cell phone expenses even though plaintiff employees admitted that they used their phones for both personal and business purposes); *Richie v. Blue Shield*

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of California, 2014 WL 6982943 at *17, 19 (N.D.Cal. 2014) (Hon. Edward Chen) (certifying class on the issue of whether the employer's reimbursement policy complied with Cochran's "reasonable percentage" of cell phone bill requirement where the employer had reason to know that employees were using their cell phones for business purposes but did not tell employees that their telephone expenses would be reimbursed). After all, the purpose of 2802 is to "prevent employers from passing along their operating expenses onto their employees." *Gattuso v. Harte-Hanks Shoppers, Inc.*, (2007) 42 Cal. 4th 554, 562.

Here, Defendants did not have a reimbursement policy for Plaintiff and the Aggrieved Employees for their reasonable and necessary business expenses. Thus, it is clear that not only did Plaintiff and the Aggrieved Employees incur expenses as a result of their employment, but that Defendants had a constructive knowledge of those expenses, and anticipating them, informed Plaintiff and the Aggrieved Employees that it would not provide any reimbursement. Therefore, Plaintiff is an aggrieved employee within the meaning of PAGA and Defendants have violated § 2802 with respect to Plaintiff and the Aggrieved Employees.

CONCLUSION

Pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency, with whom this PAGA Notice has been filed, of our intent to pursue a class and PAGA representative action against Defendant seeking PAGA penalties under Labor Code § 2699 to be brought by Plaintiff, individually and on behalf of all Aggrieved Employees, as defined above.

Nevertheless, it is the policy of this firm to attempt to negotiate an early resolution of all matters where possible and beneficial to the Aggrieved Employees and all putative class members. If Defendant is interested in attempting to resolve this matter on a PAGA representative basis, please contact me or have your lawyer contact me so that we can discuss an informal discovery plan and the possibility of early mediation on or before **November 7, 2018**. If we do not hear from you on or before November 7, 2018, we will proceed with this matter with the understanding that Defendants do not wish to negotiate an early resolution of this matter.

Respectfully submitted,



Jonathan Melmed

cc: Craig Ackermann, Esq. (by email)